

Ad Blocking Technology - The Potential Effects & Implications*

- Joseph I. Rosenbaum †

The use of ad-blocking programs has recently received considerable attention in the media, brought about in large part by the proliferation of various plug-ins or configurational ad-ons that, in one manner or another, enable the blocking of some or all advertising (or content that seems like advertising) by Internet web browsers (e.g., Adblock Plus™ plug-in Firefox). In addition, most of the popular commercially available anti-virus, anti-adware and anti-malware programs also provide ad blocking capability. By implementing and using ad-blocking software and extensions, the user is able to remove or block some or all advertisements from being viewed on web pages.

There has always been a natural balance (some would say 'tension') between the consumer's right to privacy and the marketer's desire to know more in order to reach the right customer. Although clearly context and culturally sensitive, consumers tend to cling to various degrees and aspects of privacy as a means of protecting themselves from unwanted intrusion into their lives. Consumers, however, often willingly and knowingly give up certain privacy protections – although they may not view it that way – in order to receive the benefits and advantages of offers and purchasing opportunities more tailored to their needs, and to avoid receiving "junk." Marketers, on the other hand, always want better, more timely, and more accurate segmented data, so that advertising can be focused and can cost-effectively reach those who are more likely to have an interest in buying. But marketers know that reaching too far into the minds and hearts of consumers, without their permission, can backfire and cause mistrust and disdain – not a good thing when you are trying to convince a customer to buy your product or service. Witness the public reaction to the launch of the "Beacon" feature by Facebook in our recent past.

Thus, while there has always been a balance and some tension, the increasing direct intersection of these issues, resulting from the rise of consumer and commercial use of the Internet, has spawned a degree of heat over these issues, never before seen in history. The complexity has also created a good deal of emotion and rhetoric.

There is no question that a greater degree of end-user control, and preference is a good thing for the industry. From the earliest days of advertising and sponsor-supported radio and television broadcasting – which, it should be noted, were and remain free – there has been a balance between the desire to deliver cost-effective quality programming and content, and the right of the viewer (in today's world, the end-user) to determine what, when and in what form advertisements are displayed. From the earliest days of content broadcasting and periodical distribution, advertising has played a major role in subsidizing the delivery of programming and content. Indeed, while technology and individual preferences may give the individual the right to skip the advertising – whether by walking out of the room, using time-shifting personal recording technology, activating ad-blocking

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software or otherwise – there are no prohibitions on newspapers, television or radio programs serving advertisements along with the content. There is also little question that absent advertising-supported programming and content, either the price would rise significantly or the quality of available free or subsidized content and programming would diminish, or both. It should also be borne in mind that the consuming public, apart from the access fees paid to internet service providers, for the most part believe – as they do with respect to broadcast television and radio – that Internet content and programming is generally free.

So how does one achieve an equitable balance between the individual's right to browse the internet without the distraction of unwanted advertising, and the advertising community's right to freely advertise goods and services on the web? Within the context of our analysis, we must also consider that freedom of expression – whether political or commercial speech or otherwise – is an extraordinarily valuable right inherent in a free society. One may not wish to read a particular book, buy a particular product, or even listen to a speech or view an advertisement, but personal preferences aside, any restrictions that would serve to automatically or on a wholesale basis restrict the ability of advertisers to freely advertise and offer promotions truthfully in the marketplace, is viewed with great suspicion and is justified only when there are no other available means to achieve a proper and legally acceptable balance.

The Value of Internet Advertising

The business model currently enabling proliferation of content over the Internet depends primarily upon revenue generated from advertising. Internet service providers and content aggregators parley the value of Internet advertising into broad and rich content offerings to users by providing content owners with a portion of the revenue generated by advertising on the web pages featuring their content, or through actual advertising inventory on such web pages.¹ In the absence of these *de facto* subsidies, it would be cost prohibitive to provide comprehensive, quality content offerings through the web. While total advertising expenditures are declining across nearly every form of media, Internet display advertising expenditures continue to grow.² According to a PWC report commissioned by the Interactive Advertising Bureau (IAB), Internet advertising revenue in the United States alone rose to US\$21.2 billion during 2007, a 26 percent increase over 2006.³ During the first half of 2007, expenditures on Internet display advertising rose 17.7 percent to nearly \$5.52 billion⁴, and Jupiter Research forecasts online advertising spending in the United States will nearly double by 2012, projecting that total online advertising spending will increase to \$35.4 billion.⁵ Worldwide, ZenithOptimedia forecasts online advertising expenditure to climb to \$43 billion by 2009.⁶

¹ See, e.g., *Yahoo! News & ABC News Expand Video Content Agreement*, Business Wire Dec. 13, 2006 at <http://yhoo.client.shareholder.com/ReleaseDetail.cfm?ReleaseID=222290>.

² Total advertising expenditures in the first half of 2007 decreased by 0.3 percent versus the same period in 2006. <http://www.tns-mi.com/news/09112007.htm>. See also, Giselle Abramovich, "Marketers Spending Less On Advertisements," *DMNews*, Sept. 12, 2007, <http://www.dmnews.com/cms/dm-news/research-studies/42365.html>.

³ <http://www.scribd.com/doc/2983579/IAB-PwC-2007-full-year>.

⁴ See *supra* note 1.

⁵ Dianna Dilworth, "Web ad spend to double by 2012," *DMNews*, July 3, 2007, <http://www.dmnews.com/cms/dm-sectors/media-publishing/41663.html>.

⁶ See *supra* note 2.

These figures underscore the importance of developing a strategy to balance the rights of individuals to choose to block ads, with the rights of advertisers and publishers to obtain the anticipated value from their advertisements and advertising inventory – otherwise, the industry may be undermined and the availability of free, quality content available over the Internet may be stifled and certainly would be diminished, with increasingly high barriers to entry and financial obstacles to the inclusion of robust, readily available content.

Yet the proliferation of ad-blocking software lends weight to the hypothesis that blocking the display of content (including advertising) is increasingly viewed as part of the “privacy” protections that consumers must be afforded, tipping the balance away from the free speech rights that content programmers and advertisers have traditionally enjoyed.

Addressing the Issue of Ad Blocking

United States law and regulation in the areas of privacy and protection of personal information, email marketing, and telemarketing all currently utilize some form of an opt-out approach. For example, in the area of banking and financial services and the privacy and protection of personal information, the Gramm-Leach-Bliley Act requires that consumers and customers have the right to opt out of having their non-public personal information shared with certain third parties.⁷ The Children’s Online Privacy Protection Act⁸ and the Children’s Online Privacy Protection Rule⁹ contain similar opt out provisions. With respect to email marketing and telemarketing, Congress has utilized an opt out approach to balance an individual’s desire not to receive marketing, with the need of businesses to be able to advertise for their products and services. The CAN-SPAM Act of 2003 requires commercial emails to provide an opt-out mechanism whereby a consumer can indicate his or her preference to not receive commercial emails.¹⁰ The Amended Telemarketing Sales Rules (“ATSR”) established the national “Do-Not-Call” list, thereby enabling consumers to opt out from unsolicited telemarketing calls. Similar to CAN-SPAM, the ATSR created an exception that allows a company to contact a consumer with whom it has a relationship in connection with their account or transactions that are part of the already established business relationship.¹¹

Consider, as well, the fact that no other form of media, other than websites stripped of advertising by ad-blocking software, provides a consumer with the ability to automatically receive a publication or programming (paid or otherwise), and to remove the advertising put there by the publisher, distributor or carrier. This goes back to my concern over the erosion, through technology asserted as a benefit to consumer privacy and control, to the rights of free speech and the free flow of information. A consumer cannot request an ad-free newspaper or magazine or watch a movie without a trailer, nor a television show without commercials (other than by utilizing DVR or other technological means the consumer implements and which, in many instances, don’t really “remove” the advertising, but simply enable the consumer to “skip” the ads – not unlike many websites that already employ “skip this ad” messaging). Consumers understand that advertising is part of the bargained-for exchange when receiving content, whether in the form of hard copy

⁷ 15 U.S.C. § 6802(b).

⁸ 15 U.S.C. § 6501, *et seq.*

⁹ 16 C.F.R. Part 312

¹⁰ 15 U.S.C. § 7704(a)(3)(A)(i) and (a)(5)(A)(ii).

¹¹ 16 C.F.R. Part 310.4(b)(iii)(B)(ii).

publications such as newspapers and magazines, or receiving programming on broadcast television and radio. The same holds true with online programming and content, and the advertising served in connection with the programs, music, video or other forms of content. Yes, we all receive some amount of unwanted or junk thrown at us – but how many of us would alter this balance if presented with the facts and the implications of our choices?

Further, each website as a whole and the individual elements that make up each web page, including text, graphics, audio-visual content, code and layout are generally protected by copyright. When a user removes an element of the web page (i.e., an advertisement), it could potentially give rise to a cause of action for copyright infringement by the copyright owner against the user. For example, in the context of television programming, the *Aimster* case¹² supports just such a conclusion. In *Aimster*, the Seventh Circuit concluded that commercial-skipping “amounted to creating an unauthorized derivative work, namely a commercial-free copy that would reduce the copyright owner’s income from his original program, since ‘free’ television programs are financed by the purchase of commercials by advertisers.”¹³ Applying the *Aimster* line of reasoning to ad blocking on websites, it follows that a court might conclude the ad blocking on a web page (other than for personal use by the end user) – creating an advertisement-free copy of the webpage - is analogous to creating an unauthorized derivative work of the original web page.

Moreover, removing ads from a web page would certainly violate the terms and conditions of use where those terms expressly prohibit altering, modifying, impairing or otherwise preventing the normal operation of the features, functions and display of web pages on the site. Obviously, to the extent the terms and conditions do not include explicit language precluding such conduct, it is generally a relatively simple process to make the necessary amendments – indeed, even specifically referring to ad blocking or other software that impairs, obscures or interferes with the operation of the website as programmed or intended by the owner, its licensees and suppliers. Violation or breach of these terms and conditions would expose the user to potential contractual liability, in addition to any claim of copyright infringement or other violations of the rights of the owner.

Terms of use are often embodied in “browse-wrap” agreements which contain terms and conditions that do not require affirmative acknowledgement by the user in a ‘traditional’ sense to make the agreement binding. Rather, the user automatically assents to the agreement to be bound by the terms and conditions when the user views the content or otherwise uses or interacts with the website. Increasingly, courts are finding browse-wrap agreements binding on users and are enforcing their provisions.¹⁴ In one Second Circuit case (*Verio*), the court held that enforceability of an agreement should not depend upon whether the user clicks an “I agree” button¹⁵ and went on to state that “[i]t is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.”¹⁶ Recently, in the *BoardFirst* case, the Northern District of Texas held that users of an airline’s website were bound by the website terms of use referenced in a hyperlink located at the

¹² *In re: Aimster*, 334 F.3d 643 (7th Cir. 2003)

¹³ *Id.* at 647-48 (internal citations omitted).

¹⁴ See, e.g., *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 982 (E.D.Cal. 2000) (where the court noted that a “browser wrap license agreement may be arguably valid and enforceable”).

¹⁵ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2nd Cir. 2004).

¹⁶ *Id.*

bottom of the web site's home page.¹⁷ Based on recent case law, if one assumes that a browse-wrap agreement containing terms governing the use of a website would be found enforceable, a user will be bound by any restrictions that apply, including a prohibition on altering or removing content, marks or logos, and/or blocking advertisements. If a user implements, allows or enables ad-blocking software, he or she could then be held in violation of the agreement.

Options and Recommendations

In light of the above, consider the ways advertising could be restricted on the Internet. Laws and regulations could be enacted by legislators and government regulators that would attempt to restrict advertising. Ouch. Absent some compelling societal interest (e.g., protection of children, health, safety considerations), most restrictions on the exercise of free speech will and should be struck down as unconstitutional. The Internet and the economic models are evolving through experimentation and innovation; it is therefore highly possible that legislation would not only be premature, but would either stifle or fail to keep pace with a dynamically evolving technology environment. Before the "web," no one could have predicted the explosive growth of the Internet for anything other than messaging. Can anyone predict what Web 3.0 will look like? What cloud computing or virtual environment will enable for companies or consumers?

Self-regulation? Not a bad idea. With a few exceptions, the advertising industry, in cooperation with regulators, has taken to policing and regulating themselves in a manner that has stood the test of time. There is no reason to believe that interactive or other forms of Internet, web-based advertising, could not similarly be managed and regulated. Besides, a self regulatory mechanism is far more fluid and able to evolve to meet the challenges of new technology, new economics and new advertising mechanisms. It's certainly worth a try.

How about technology? Clearly, technology can be used to restrict advertising; the problem that arises is the inability of technology to think like an end-user. It's counterproductive to block all advertising because there are advertisements and offers consumers want to see and valuable offers they should be permitted to consider and advertisers should be permitted to offer. It is an interesting quirk of technological fact that the very innovation that has given advertisers greater potential than ever to direct focused advertising to individuals who are most likely to want it - by better appreciation of buying and browsing habits - is the very technology that could also be used to block advertising. It is no ironic quirk that often the same people who complain that advertising served to them on broadcast radio or television (or the Internet) is irrelevant (hence they seek to turn them off or block them) are the very constituency that is most vocal about advertisers' ability to gather even non-personal aggregate statistics in order to help make the advertising more relevant and timely. An angry or suspicious consumer doesn't make a very good customer.

In support of a strong self-regulatory approach, the IAB, on behalf of and with the support of its members, has recommended that an opt-out approach be adopted as the benchmark for discussions regarding the use or restriction of ad-blocking mechanisms. That

¹⁷ *Southwest Airlines Co. v. BoardFirst LLC*, N.D.Tex., No. 3:06cv0891, Sep. 12, 2007, *Mem. & Order* at 9. (stressing that the validity of a browse-wrap license turns on whether the website user has actual or constructive notice of the terms of use).

recommendation is based on a number of factors the IAB believes are both equitable and compelling:

- (1) Virtually all regulatory and legislative guidelines and practices in the United States dealing with comparable advertising and marketing practices applicable to emerging technology (e.g., privacy, e-mail – CAN-SPAM, telemarketing – Do Not Call) have adopted and embraced an “opt out” formulation
- (2) U.S. consumers appear to favor having the option and the right to exclude content, rather than being automatically denied content and affirmatively having to seek out promotional or other offers that may be of interest, especially in the interactive context of today’s web-based technology
- (3) Any approach must take into account and respect the intellectual property (e.g., copyright, service and trademark) and other rights and interests of website owners and operators, as well as the providers of programming and content, in controlling the overall “look and feel,” protecting rights holders, and preventing third parties (including consumers) from modifying or altering the content or programming, or using it in unintended and impermissible ways
- (4) The validity and enforceability of the terms and conditions of most website browse-wrap agreements prohibit alteration of websites and web pages, including all the content, which includes advertising and promotional material

With an opt-out approach, consumers would maintain the ability to customize their browsing experience to avoid advertising if they so choose, and advertisers and publishers would remain free to receive the expected value and benefit from their Internet advertisements and advertising inventory – all while continuing to subsidize the availability of content and quality programming. The challenge will be adopting an opt-out process that fully informs consumers of their choices and allows for selective, customized blocking.

Conclusion

Both the Internet-advertising and content-distribution markets are thriving, and the legal and regulatory community should work together with consumers, publishers, technology providers, advertisers and their agencies, to ensure these markets continue to grow healthfully. Continuing to promote the advertising-supported delivery of cost-effective, quality programming and content; respecting the rights of consumers and their ability to exercise better management control over what they do or do not wish to see; and respecting the rights of content owners and digital rights holders, hosting and service provider companies; should continue to remain the primary focus of the balancing of interests. Using an opt-out consumer approach, coupled with a strong self-regulatory framework and backed by more formal legal and regulatory mechanisms, where abuses occur or where specific interests require greater protection – these are the tools of a constructive, industry-consumer, regulatory dialog.